SUPREME COURT OF THE UNITED STATES

No. 90–1972

UNITED STATES, PETITIONER *v.* JOHN H. WILLIAMS, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[May 4, 1992]

JUSTICE STEVENS, with whom JUSTICE BLACKMUN and JUSTICE O'CONNOR join, and with whom JUSTICE THOMAS joins as to Parts II and III, dissenting.

The Court's opinion announces two important changes in the law. First, it justifies its special accommodation to the Solicitor General in granting certiorari to review a contention that was not advanced in either the District Court or the Court of Appeals by explaining that the fact that the issue was raised in a different case is an adequate substitute for raising it in *this* case. Second, it concludes that a federal court has no power to enforce the prosecutor's obligation to protect the fundamental fairness of proceedings before the grand jury.

The question presented by the certiorari petition is whether the failure to disclose substantial exculpatory evidence to the grand jury is a species of prosecutorial misconduct that may be remedied by dismissing an indictment without prejudice. In the District Court and the Court of Appeals both parties agreed that the answer to that question is "yes, in an appropriate case." The only disagreement was whether this was an appropriate case: The prosecutor vigorously argued that it was not because the undisclosed evidence was not substantial exculpatory evidence, while respondent countered that the evidence was exculpatory and the prosecutor's misconduct warranted a dismissal with prejudice.

In an earlier case arising in the Tenth Circuit, *United States v. Page*, 808 F. 2d 723, cert. denied, 482 U. S. 918 (1987), the defendant had claimed that his indictment should have been dismissed because the prosecutor was guilty of misconduct during the grand jury proceedings. Specifically, he claimed that the prosecutor had allowed the grand jury to consider false testimony and had failed to present it with substantial exculpatory evidence. 808 F. 2d, at 726–727. After noting that there are "two views concerning the duty of a prosecutor to present exculpatory evidence to a grand jury," *id.*, at 727, the court concluded that the "better, and more balanced rule" is that "when *substantial* exculpatory evidence is discovered in the course of an investigation, it must be revealed to the grand jury," *id.*, at 728 (emphasis in original). The court declined to dismiss the indictment, however, because the evidence withheld in that case was not "clearly exculpatory." *Ibid.*

In this case the Government expressly acknowledged the responsibilities described in *Page*, but argued that the withheld evidence was not exculpatory or significant.[1] Instead of questioning the controlling rule of law, it distinguished the facts of this case from those of an earlier case in which an indictment had been dismissed because the

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[1] ``The government has acknowledged that it has certain responsibilities under the case of *United States v. Page,* 808 F. 2d 723 (10th Cir. 1987), and that includes a duty to not withhold substantial exculpatory evidence from a grand jury if such exists. . . . The government would contend that . . . it was familiar with and complied with the principles stated in the case. . . . Considering the evidence as a whole, it is clear that the government complied with, and went beyond, the requirements of *Page, supra*.'' Brief for United States in Response to Appellee's Brief in Nos. 88–2827, 88–2843 (CA10), pp. 9–10.

prosecutor had withheld testimony that made it factually impossible for the corporate defendant to have been guilty.[2] The Government concluded its principal brief with a request that the Court apply the test set forth in *Bank of Nova Scotia v. United States*, 487 U. S. 250 (1988), "follow the holding of *Page*," and hold that dismissal was not warranted in this case because the withheld evidence was not substantial exculpatory evidence and respondent "was not prejudiced in any way." Brief for United States in No. 88–2827 (CA10), pp. 40–43.

After losing in the Court of Appeals, the Government reversed its position and asked this Court to grant certiorari and to hold that the prosecutor has no judicially enforceable duty to present exculpatory evidence to the grand jury. In his brief in opposition to the petition, respondent clearly

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[2]Respondent had relied on *United States* v. Phillips Petroleum Co.,, 435 F. Supp. 610 (ND Okla. 1977). The Government distinguished the case based on ``the type of evidence excluded. In *Phillips, supra,* the prosecutor sent the Grand Jury home for the day, but continued questioning a witness. In that session, outside the hearing of the Grand Jury members, the witness, who had been granted use immunity, testified to certain information which showed that the witness had been the one who knowingly committed an offense, and showed that the corporation had not intentionally committed an offense in that case. There was no question that the withheld testimony made it factually impossible for the corporate defendant to have been guilty, and therefore the evidence was substantial and exculpatory. In the instant case there is a disagreement between the government and the defendant as to whether the documents the defendant wants presented in full are exculpatory." Brief for United States in No. 88–2827 (CA10), p. 38.

pointed out that the question presented by the petition "was neither presented to nor addressed by the courts below." Brief in Opposition 2. He appropriately called our attention to many of the cases in which we have stated, repeated, and reiterated the general rule that precludes a grant of certiorari when the question presented was "not pressed or passed upon below."[3] *Id.*, at 5–9. Apart from the fact that the United States is the petitioner, I see no reason for not following that salutary practice in this case.[4] Nevertheless, the requisite number of Justices saw fit to grant the Solicitor General's

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[3]*Duignan* v. *United States*, 274 U. S. 195, 200 (1927); see also, *e.g.*, *United States v. Lovasco*, 431 U. S. 783, 788, n. 7 (1977); *United States* v. *Ortiz*, 422 U. S. 891, 898 (1975). Until today the Court has never suggested that the fact that an argument was pressed by the litigant or passed on by the court of appeals in a different case would satisfy this requirement.

[4]*Stevens* v. *Department of Treasury*, 500 U. S. ___ (1991), and *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U. S. ___ (1991), discussed by the Court, *ante*, at 4–5, were routine applications of the settled rule. Although the parties may not have raised the questions presented in the petitions for certiorari before the courts of appeals in those cases, the courts treated the questions as open questions that they needed to resolve in order to decide the cases. Similarly, in *Springfield* v. *Kibbe*, 480 U. S. 257 (1987), the Court of Appeals had expressly considered and answered the question that JUSTICE O'CONNOR thought we should decide, see *id.*, at 263–266. This case, in contrast, involved "the routine restatement and application of settled law by an appellate court," which we have previously found insufficient to satisfy the "pressed or passed upon below" rule. *Illinois* v. *Gates*, 462 U. S. 213, 222–223 (1982).

petition. 502 U. S. ___ (1991).

The Court explains that the settled rule does not apply to the Government's certiorari petition in this case because the Government raised the same question three years earlier in the *Page* case and the Court of Appeals passed on the issue in that case. *Ante*, at 8. This is a novel, and unwise, change in the rule. We have never suggested that the fact that a court has repeated a settled proposition of law and applied it, without objection, in the case at hand provides a sufficient basis for our review.[5] See *Illinois* v. *Gates*, 462 U. S. 213, 222–223 (1982), and cases

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[5]The Court expresses an inability to understand the difference between the routine application, without objection, of a settled rule, on the one hand, and the decision of an open question on a ground not argued by the parties, on the other. The difference is best explained in light of the basic assumption that the adversary process provides the best method of arriving at correct decisions. Rules of appellate practice generally require that an issue be actually raised and debated by the parties if it is to be preserved. In the exceptional case, in which an appellate court announces a new rule that had not been debated by the parties, our review may be appropriate to give the losing party an opportunity it would not otherwise have to challenge the rule. In this case, however, there is no reason why the Government could not have challenged the *Page* rule in this case in the Tenth Circuit. There is no need for an exception to preserve the losing litigant's opportunity to be heard. Moreover, the Government's failure to object to the application of the *Page* rule deprived the Court of Appeals of an opportunity to re-examine the validity of that rule in the light of intervening developments in the law. "Sandbagging" is just as improper in an appellate court as in a trial court.

cited therein. If this is to be the rule in the future, it will either provide a basis for a significant expansion of our discretionary docket[6] or, if applied only to benefit repetitive litigants, a special privilege for the Federal Government.

This Court has a special obligation to administer justice impartially and to set an example of impartiality for other courts to emulate. When the Court appears to favor the Government over the ordinary litigant, it seriously compromises its ability to discharge that important duty. For that reason alone, I would dismiss the writ of certiorari as improvidently granted.[7]

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[6]The "expressed or passed on" predicate for the exercise of our jurisdiction is of special importance in determining our power to review state court judgments. If the Court's newly announced view that the routine application of a settled rule satisfies the "passed on" requirement in a federal case, I see no reason why it should not also satisfy the same requirement in a state case.

[7]The Court suggests that it would be "improvident" for the Court to dismiss the writ of certiorari on the ground that the Government failed to raise the question presented in the lower courts because respondent raised this argument in his brief in opposition, the Court nevertheless granted the writ, and the case has been briefed and argued. *Ante*, at 4. I disagree. The vote of four Justices is sufficient to grant a petition for certiorari, but that action does not preclude a majority of the Court from dismissing the writ as improvidently granted after the case has been argued. See, *e.g.*, *NAACP* v. *Overstreet*, 384 U. S. 118 (1966) (dismissing, after oral argument, writ as improvidently granted over the dissent of four Justices). We have frequently dismissed the writ as improvidently granted after the case has been briefed and argued; in fact, we have already done so twice

Like the Hydra slain by Hercules, prosecutorial misconduct has many heads. Some are cataloged in Justice Sutherland's classic opinion for the Court in *Berger* v. *United States,* 295 U. S. 78 (1935):

> "That the United States prosecuting attorney over-stepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record. He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner. . . .
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> "The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury." *Id.,* at 84–85.

This, of course, is not an exhaustive list of the kinds of improper tactics that overzealous or misguided prosecutors have adopted in judicial proceedings.

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this Term. See *Gibson* v. *Florida Bar*, ___ U. S. ___ (1991); *PFZ Properties, Inc.* v. *Rodriguez*, ___ U. S. ___ (1992). Although we do not always explain the reason for the dismissal, we have on occasion dismissed the writ for the reasons raised by the respondent in the brief in opposition. Thus, nothing precludes the Court from dismissing the writ in this case.

The reported cases of this Court alone contain examples of the knowing use of perjured testimony, *Mooney* v. *Holohan*, 294 U. S. 103 (1935), the suppression of evidence favorable to an accused person, *Brady* v. *Maryland*, 373 U. S. 83, 87–88 (1963), and misstatements of the law in argument to the jury, *Caldwell* v. *Mississippi*, 472 U. S. 320, 336 (1985), to name just a few.

Nor has prosecutorial misconduct been limited to judicial proceedings: the reported cases indicate that it has sometimes infected grand jury proceedings as well. The cases contain examples of prosecutors presenting perjured testimony, *United States* v. *Basurto*, 497 F. 2d 781, 786 (CA9 1974), questioning a witness outside the presence of the grand jury and then failing to inform the grand jury that the testimony was exculpatory, *United States* v. *Phillips Petroleum, Inc.*, 435 F. Supp. 610, 615–617 (ND Okla. 1977), failing to inform the grand jury of its authority to subpoena witnesses, *United States* v. *Samango*, 607 F. 2d 877, 884 (CA9 1979), operating under a conflict of interest, *United States* v. *Gold*, 470 F. Supp. 1336, 1346–1351 (ND Ill. 1979), misstating the law, *United States* v. *Roberts*, 481 F. Supp. 1385, 1389, and n. 10 (CD Cal. 1980),[8] and misstating the facts on cross-examination of a witness, *United States* v. *Lawson*, 502 F. Supp. 158, 162, and nn. 6–7 (Md. 1980).

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[8]The court found the Government guilty of prosecutorial misconduct because it "fail[ed] to provide the polygraph evidence to the Grand Jury despite the prosecutor's guarantee to Judge Pregerson that all exculpatory evidence would be presented to the Grand Jury, and compound[ed] this indiscretion by erroneously but unequivocally telling the Grand Jury that the polygraph evidence was inadmissible." *United States* v. *Roberts*, 481 F. Supp., at 1389.

Justice Sutherland's identification of the basic reason why that sort of misconduct is intolerable merits repetition:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger* v. *United States*, 295 U. S., at 88.

It is equally clear that the prosecutor has the same duty to refrain from improper methods calculated to produce a wrongful indictment. Indeed, the prosecutor's duty to protect the fundamental fairness of judicial proceedings assumes special importance when he is presenting evidence to a grand jury. As the Court of Appeals for the Third Circuit recognized, "the costs of continued unchecked prosecutorial misconduct" before the grand jury are particularly substantial because there

> "the prosecutor operates without the check of a judge or a trained legal adversary, and virtually immune from public scrutiny. The prosecutor's abuse of his special relationship to the grand jury poses an enormous risk to defendants as well. For while in theory a trial provides the defendant with a full opportunity to contest and disprove the charges against him, in practice, the handing up

> of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo. Where the potential for abuse is so great, and the consequences of a mistaken indictment so serious, the ethical responsibilities of the prosecutor, and the obligation of the judiciary to protect against even the appearance of unfairness, are correspondingly heightened." *United States* v. *Serubo*, 604 F. 2d 807, 817 (1979).

In his dissent in *United States* v. *Ciambrone*, 601 F. 2d 616 (CA2 1979), Judge Friendly also recognized the prosecutor's special role in grand jury proceedings:

> "As the Supreme Court has noted, `the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury."' *United States* v. *Calandra*, 414 U. S. 338, 343, . . . (1974). Before the grand jury the prosecutor has the dual role of pressing for an indictment and of being the grand jury adviser. In case of conflict, the latter duty must take precedence. *United States* v. *Remington*, 208 F. 2d 567, 573–74 (2d Cir. 1953) (L. Hand, J., dissenting), *cert. denied*, 347 U. S. 913 . . . (1954).
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> "The *ex parte* character of grand jury proceedings makes it peculiarly important for a federal prosecutor to remember that, in the familiar phrase, the interest of the United States `in a criminal prosecution is not that it shall win a case, but that justice shall be done.' *Berger* v. *United States*, 295 U. S. 78, 88 . . . (1935)." *Id.,* at 628–629.[9]

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[9]Although the majority in *Ciambrone* did not agree with Judge Friendly's appraisal of the prejudicial

The standard for judging the consequences of prosecutorial misconduct during grand jury proceedings is essentially the same as the standard applicable to trials. In *United States* v. *Mechanik*, 475 U. S. 66 (1986), we held that there was "no reason not to apply [the harmless error rule] to `errors, defects, irregularities, or variances' occurring before a grand jury just as we have applied it to such error occurring in the criminal trial itself," *id.*, at 71–72. We repeated that holding in *Bank of Nova Scotia* v. *United States*, 487 U. S. 250 (1988), when we rejected a defendant's argument that an indictment should be dismissed because of prosecutorial misconduct and irregularities in proceedings before the grand jury. Referring to the prosecutor's

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impact of the misconduct in that case, it also recognized the prosecutor's duty to avoid fundamentally unfair tactics during the grand jury proceedings. Judge Mansfield explained:

"On the other hand, the prosecutor's right to exercise some discretion and selectivity in the presentation of evidence to a grand jury does not entitle him to mislead it or to engage in fundamentally unfair tactics before it. The prosecutor, for instance, may not obtain an indictment on the basis of evidence known to him to be perjurious, *United States* v. *Basurto*, 497 F. 2d 781, 785–86 (9th Cir. 1974), or by leading it to believe that it has received eyewitness rather than hearsay testimony, *United States* v. *Estepa*, 471 F. 2d 1132, 1136–37 (2d Cir. 1972). We would add that where a prosecutor is aware of any substantial evidence negating guilt he should, in the interest of justice, make it known to the grand jury, at least where it might reasonably be expected to lead the jury not to indict. See ABA Project on Standards for Criminal Justice—the Prosecution Function, §3.6, pp. 90–91." 601 F. 2d, at 623.

misconduct before the grand jury, we "concluded that our customary harmless-error inquiry is applicable where, as in the cases before us, a court is asked to dismiss an indictment prior to the conclusion of the trial," *id.*, at 256. Moreover, in reviewing the instances of misconduct in that case, we applied precisely the same standard to the prosecutor's violations of Rule 6 of the Federal Rules of Criminal Procedure and to his violations of the general duty of fairness that applies to all judicial proceedings. This point is illustrated by the Court's comments on the prosecutor's abuse of a witness:

> "The District Court found that a prosecutor was abusive to an expert defense witness during a recess and in the hearing of some grand jurors. Although the Government concedes that the treatment of the expert tax witness was improper, the witness himself testified that his testimony was unaffected by this misconduct. The prosecutors instructed the grand jury to disregard anything they may have heard in conversations between a prosecutor and a witness, and explained to the grand jury that such conversations should have no influence on its deliberations. App. 191. In light of these ameliorative measures, there is nothing to indicate that the prosecutor's conduct toward this witness substantially affected the grand jury's evaluation of the testimony or its decision to indict." 487 U. S., at 261.

Unquestionably, the plain implication of that discussion is that if the misconduct, even though not expressly forbidden by any written rule, had played a critical role in persuading the jury to return the indictment, dismissal would have been required.

In an opinion that I find difficult to comprehend, the Court today repudiates the assumptions underlying these cases and seems to suggest that the court has no authority to supervise the conduct of the

prosecutor in grand jury proceedings so long as he follows the dictates of the Constitution, applicable statutes, and Rule 6 of the Federal Rules of Criminal Procedure. The Court purports to support this conclusion by invoking the doctrine of separation of powers and citing a string of cases in which we have declined to impose categorical restraints on the grand jury. Needless to say, the Court's reasoning is unpersuasive.

Although the grand jury has not been "textually assigned" to "any of the branches described in the first three Articles" of the Constitution, *ante*, at 9, it is not an autonomous body completely beyond the reach of the other branches. Throughout its life, from the moment it is convened until it is discharged, the grand jury is subject to the control of the court. As Judge Learned Hand recognized over sixty years ago, "a grand jury is neither an officer nor an agent of the United States, but a part of the court." *Falter* v. *United States*, 23 F. 2d 420, 425 (CA2), cert. denied, 277 U. S. 590 (1928). This Court has similarly characterized the grand jury:

> "A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses. It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so." *Brown* v. *United States*, 359 U. S. 41, 49 (1959).

See also *Blair* v. *United States*, 250 U. S. 273, 280 (1919) ("At the foundation of our Federal Government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States"); *United States* v. *Calandra*, 414 U. S. 338, 346, and n. 4

(1974).

This Court has, of course, long recognized that the grand jury has wide latitude to investigate violations of federal law as it deems appropriate and need not obtain permission from either the court or the prosecutor. See, *e.g.*, *id.,* at 343; *Costello* v. *United States*, 350 U. S. 359, 362 (1956); *Hale* v. *Henkel*, 201 U. S. 43, 65 (1906). Correspondingly, we have acknowledged that "its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *Calandra*, 414 U. S., at 343. But this is because Congress and the Court have generally thought it best not to impose procedural restraints on the grand jury; it is not because they lack all power to do so.[10]

To the contrary, the Court has recognized that it has the authority to create and enforce limited rules applicable in grand jury proceedings. Thus, for example, the Court has said that the grand jury "may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law." *Id.*, at 346. And the Court may prevent a grand jury from violating such a privilege by quashing or modifying a subpoena, *id.*, at 346, n. 4, or issuing a protective order forbidding questions in violation of the privilege, *Gravel* v. *United States*, 408 U. S. 606, 628–629 (1972). Moreover, there are, as the Court notes, *ante*, at 12–13, a series of cases in which we declined to impose categorical restraints on the grand jury. In none of those cases, however, did we question our power to reach a contrary result.[11]

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[10]Indeed, even the Court acknowledges that Congress has the power to regulate the grand jury, for it concedes that Congress "is free to prescribe" a rule requiring the prosecutor to disclose substantial exculpatory evidence to the grand jury. *Ante*, at 17.

[11]In *Costello* v. *United States*, 350 U. S. 359, 363

Although the Court recognizes that it may invoke its supervisory authority to fashion and enforce privilege rules applicable in grand jury proceedings, *ante*, at 11, and suggests that it may also invoke its supervisory authority to fashion other limited rules of grand jury procedure, *ante*, at 12, it concludes that it has no authority to "*prescrib[e]* standards of prosecutorial conduct before the grand jury," *ante*, at 9, because that would alter the grand jury's historic role as an independent, inquisitorial institution. I disagree.

We do not protect the integrity and independence of the grand jury by closing our eyes to the countless forms of prosecutorial misconduct that may occur inside the secrecy of the grand jury room. After all, the grand jury is not merely an investigatory body; it also serves as a "protector of citizens against arbitrary and oppressive governmental action." *United States* v. *Calandra*, 414 U. S., at 343. Explaining why the grand jury must be both "independent" and "informed," the Court wrote in *Wood v. Georgia*, 370 U. S. 375 (1962):

(1956), for example, the Court held that an indictment based solely on hearsay evidence is not invalid under the Grand Jury Clause of the Fifth Amendment. The Court then rejected the petitioner's argument that it should invoke "its power to supervise the administration of justice in federal courts" to create a rule permitting defendants to challenge indictments based on unreliable hearsay evidence. The Court declined to exercise its power in this way because "[n]o persuasive reasons are advanced for establishing such a rule. It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change." *Id.*, at 364.

> "Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.'' *Id.*, at 390.

It blinks reality to say that the grand jury can adequately perform this important historic role if it is intentionally misled by the prosecutor—on whose knowledge of the law and facts of the underlying criminal investigation the jurors will, of necessity, rely.

Unlike the Court, I am unwilling to hold that countless forms of prosecutorial misconduct must be tolerated—no matter how prejudicial they may be, or how seriously they may distort the legitimate function of the grand jury—simply because they are not proscribed by Rule 6 of the Federal Rules of Criminal Procedure or a statute that is applicable in grand jury proceedings. Such a sharp break with the traditional role of the federal judiciary is unprecedented, unwarranted, and unwise. Unrestrained prosecutorial misconduct in grand jury proceedings is inconsistent with the administration of justice in the federal courts and should be redressed in appropriate cases by the dismissal of indictments obtained by improper methods.[12]

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[12]Although the Court's opinion barely mentions the fact that the grand jury was intended to serve the invaluable function of standing between the accuser and the accused, I must assume that in a proper case it will acknowledge—as even the Solicitor General does—that unrestrained prosecutorial misconduct in grand jury proceedings ``could so subvert the integrity of the grand jury process as to justify judicial

What, then, is the proper disposition of this case? I agree with the Government that the prosecutor is not required to place all exculpatory evidence before the grand jury. A grand jury proceeding is an *ex parte* investigatory proceeding to determine whether there is probable cause to believe a violation of the criminal laws has occurred, not a trial. Requiring the prosecutor to ferret out and present all evidence that could be used at trial to create a reasonable doubt as to the defendant's guilt would be inconsistent with the purpose of the grand jury proceeding and would place significant burdens on the investigation. But that does not mean that the prosecutor may mislead the grand jury into believing that there is probable cause to indict by withholding clear evidence to the contrary. I thus agree with the Department of Justice that "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." U. S. Dept. of Justice, United States Attorneys' Manual, Title 9, ch. 11, ¶9–11.233, 88 (1988).

Although I question whether the evidence withheld in this case directly negates respondent's guilt,[13] I

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intervention. Cf. *Franks* v. *Delaware*, 438 U. S. 154, 164–171 (1978) (discussing analogous considerations in holding that a search warrant affidavit may be challenged when supported by deliberately false police statements).'' Brief for United States 22, n. 8.

[13]I am reluctant to rely on the lower courts' judgment in this regard, as they apparently applied a more lenient legal standard. The District Court dismissed the indictment because the "information withheld raises reasonable doubt about the Defendant's intent

need not resolve my doubts because the Solicitor General did not ask the Court to review the nature of the evidence withheld. Instead, he asked us to decide the legal question whether an indictment may be dismissed because the prosecutor failed to present exculpatory evidence. Unlike the Court and the Solicitor General, I believe the answer to that question is yes, if the withheld evidence would plainly preclude a finding of probable cause. I therefore cannot endorse the Court's opinion.

More importantly, because I am so firmly opposed to the Court's favored treatment of the Government as a litigator, I would dismiss the writ of certiorari as improvidently granted.

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to defraud," and thus "renders the grand jury's decision to indict gravely suspect." App. to Pet. for Cert. 26a. The Court of Appeals affirmed this decision because it was not "clearly erroneous." 899 F. 2d 898, 902–904 (CA10 1990).